

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD LOWERY

Claimant

VS.

TRANSAM TRUCKING, INC.

Respondent

Self-Insured

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Docket No. 231,264

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Julie A. N. Sample on June 15, 1998.

ISSUES

The issue on appeal is whether this claim should be barred on the grounds that claimant's injury was contributed to by claimant's use of drugs. K.S.A. 1996 Supp. 44-501(d)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The ALJ found that the evidence did not establish that claimant's injury was contributed to by the use of drugs. After reviewing the record and considering the arguments, the Appeals Board concludes the Order by the ALJ should be affirmed.

Claimant, a truck driver, was injured when the truck he was driving turned over. Claimant testified that the accident occurred when he reached over to the passenger seat to pick up a sandwich. As he did so, he went off the shoulder, the load shifted, and his truck turned over.

Subsequent drug testing at the hospital revealed use of marijuana and cocaine. Claimant's urine contained marijuana metabolites at 43 ng/mL. The cocaine level was 824 ng/mL.

The accident occurred January 5, 1998. Claimant testified that approximately four days earlier around midnight January 1, 1998, he smoked one joint and shared a gram of

cocaine with three or four other people. Claimant denied other use between January 1, 1998, and the January 5, 1998 accident.

Respondent argues claimant has the burden of proving the drug use did not contribute to the accident. The Board disagrees. Drug use, like intoxication, is a defense. Respondent has the burden of proving the elements of the defense. Schmidt v. Jensen Motors, Inc., 208 Kan. 182, 490 P.2d 383 (1971).

The record contains opinions by two medical experts. Dr. Donald W. Goodwin states in his letter of May 20, 1998, that the marijuana and cocaine claimant ingested probably did not contribute to the accident. Respondent submits a report from Dr. William A. Watson. Dr. Watson gives several opinions which tend to undermine some of the evidence claimant presented. Dr. Watson's report also suggests that claimant's testimony about the amount and timing of his use of drugs is not correct. But in our view, Dr. Watson's report stops short of stating an opinion that the cocaine or marijuana contributed to the accident. Dr. Watson states that the testing "cannot be interpreted to exclude any effects on driving performance." He states that marijuana, like alcohol, increases the risk of a motor vehicle crash occurring. He also states that a physical "crash" can occur after cocaine use has stopped. The "crash" may include exhaustion and decreased central nervous system activity. Dr. Watson does not, in our view, establish a probability that the drug use contributed to the accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Julie A. N. Sample on June 15, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

c: Thomas Stein, Kansas City, MO
Frederick J. Greenbaum, Kansas City, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director